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NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA,
Appellee.

BRIEF AND STATEMENT OPPOSING JURISDICTION OF PETITION FOR WRIT OF CERTIORARI

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May It Please the Court:

The appellee, in opposing the jurisdiction of this Court to review the above entitled cause on writ of certiorari, respectfully represents:

A.

Statutory Provisions Believed to Oppose the Jurisdiction

Section 8 of the Act of Congress of February 13, 1925, provides in part as follows:

> "That no * * * writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor

is made within six months; *provided,* that for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a Justice of the Supreme Court."

Paragraph 2, Rule 38, Rules of the Supreme Court, provides:

> "The petition will be deemed in time when it, the printed record, and the supporting brief, are filed with the Clerk within the period prescribed by Section 8 of the Act of February 13, 1925."

The Supreme Court of the United States has held that it has no power to review by certiorari a final judgment or decree of either a State or a Federal Court after the expiration of the period fixed by statute.

> *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, at 418.
> *Rust Land Co.* v. *Jackson,* 250 U. S. 71.

By the terms of the above quoted Section 8 (a), the time within which to apply for writ of certiorari may be extended not exceeding sixty days *only* by a Justice of the Supreme Court. In case on appeal to the Supreme Court of the United States, the time within which to docket the case in that Court—though not the time within which to apply for the allowance of the appeal—may be extended, as well by the judge or justice of the court appealed from, as by a Justice of the Supreme Court of the United States; but on petition for a certiorari the extension of time within which to apply for the writ may be granted only by a Justice of the Federal Supreme Court.

The opinion of the lower court is dated May 17, 1932, and is copied in full on the record (R. 90).

The date of the judgment to be reviewed is May 17, 1932 (R. 89).

On June 1, 1932, the acting Chief Justice of the Supreme Court of Oklahoma granted an extension of time of twenty days within which to file a petition for rehearing.

On June 10, 1932, the acting Chief Justice of the Supreme Court of Oklahoma stayed its mandate in said case for a period of sixty days.

On August 8, 1932, the Chief Justice of the Supreme Court of Oklahoma made an order staying its mandate until August 15, 1932. These three orders are perhaps set up in the record, but the page numbers of the same are unknown to the respondent, and cannot be ascertained at said time, as we do not have access to the said record.

The transcript of the record of the Supreme Court of Oklahoma, including all the appeal papers, was lodged in the office of the Clerk of this Court on September 8, 1932, and therefore filed out of time and should be dismissed for want of jurisdiction on above authorities.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat at L. 936, 937 (United States Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

"Sec. 237 (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."'

B.

Nature of Case

It is the contention of the appellee that such statutes of the State of Oklahoma and other provisions of Chapter 84, C. O. S. 1921, relating to Revenue and Taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are valid when applied to the crude oil in question, and not repugnant to the Constitution, treaties, and laws in the United States.

The appellant relies upon the theory of a governmental agency, as distinguished from the idea of interfering with a property tax upon that which has been derived from such property and its ownership transferred to a corporation,

and has become a part of the mass of property of the citizens of the State. However, the idea of a governmental agency, as applied to the oil in this case, can well be extended both forward and backward. If extended backward, when the Government, with like duties owing to its Indian wards, allowed certain classes to make their own contracts, without supervision of the Government, and allowed the share of the Indian landowner and the share of the product belonging to the operator, produced as result of labor in extraction, each to be subject to state tax, while the operator's share, working on restricted land, is exempt, equality in burden bearing no longer exists. The operator on the restricted land has the advantage. The enabling act requires, that the State Constitution shall "make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The Supreme Court of the United States in *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 72 L. ed. 709, had for consideration the question again, and after the Jaybird Mining Company case was passed on. In that case the Secretary of the Interior had, with restricted funds, bought property which was conveyed to an allottee by deed carrying restrictions against alienation. It was leased out under the supervision of the Secretary, and there was production of oil. Elaborate briefs were filed in the case, and the Court, in discussing the matter, after enumerating some of

the decisions and the statutory requirements, concludes the opinion as follows:

> "Little need be said as to the power of the Secretary of the Interior to exempt the land and its uses from taxation. The power, if it exists, is one conferred by Congress, but neither it nor the Secretary has in terms purported to make or authorize such an exemption.
>
> "The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands, but Sec. 4 expressly subjects lands from which restrictions have been removed to state taxation. This section was adopted in response to representations that the revenue of the State of Oklahoma was insufficient for state purpose, that large areas of lands within the state allotted to Indians were exempt from taxation as agencies of the Federal Government and that Indian citizens were enjoying the benefit of local government without taxation. Report of the Senate Committee on Indian Affairs, S. Rep. No. 575, 60th Cong., 1st Sess; Report of the House Committee on Indian Affairs, H. Rep. No. 1454, 60th Cong., 1st Sess.
>
> "At the time of this legislation restrictions on some allotted lands had been removed by reason of the expiration of the restricted period. There were also allotments on behalf of allottees dying before allotment which in the hands of their heirs were unrestricted. See *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578. It cannot be assumed that Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a tax exemption by implication. In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land. See *U. S.* v. *Ransom*, 263 U. S. 691, 68 L.

ed. 508, 44 Sup. Ct. Rep. 230, affirming (C. C. A. 8th) 284 Fed. 108; *U. S.* v. *Brown* (C. C. A. 8th), 8 Fed. (2d) 564; *U. S.* v. *Gray* (C. C. A. 8th), 284 Fed. 103; *U. S.* v. *Nummert* (C. C. A. 8th), 15 Fed. (2d) 926."

Quoting from the case *Central Coal & Coke Co.* v. *Carseloway, Co. Assessor,* 45 Fed. (2d) 744, decided by the Circuit Court of Appeals for the Tenth Circuit, as follows:

> "It is clear that the plaintiffs own properties of large value, situated in Oklahoma. Their ownership is secure because Oklahoma maintains a stable government. If plaintiffs need not contribute to the maintenance of that government, while enjoying the benefits thereof, some all-sufficient reason should appear."

C.

Cases Believed to Oppose Jurisdiction on Two Grounds

First: Petition for writ of certiorari is out of time.

Todelo Scale Co. v. *Computing Scale Co.,* 261 U. S. 399, at 418.
Rust Land Co. v. *Jackson,* 250 U. S. 71.

Second: Said matter does not involve a federal question.

Shaw v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575.
Central Coal & Coke Co. v. *Carseloway, Co. Assessor,* 45 Fed. (2d) 744.

We respectfully submit that this Court has no jurisdiction of this case on a writ of certiorari, and that the same should be dismissed.

Respectfully submitted,

ERNEST F. JENKINS,
Counsel for Appellee.